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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DR. MARSHALL C. SASSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dr. Marshall C. Sasser is the owner of old rice fields which were built in the 1700's.

The two watercourses involved in this case drain out of Dr. Sasser's old rice fields into the Waccamaw and Pee Dee Rivers in Georgetown County, South Carolina. These two small drains have never been navigable in fact, have only one public terminus, the point at which each enters the river of which it is a small tributary, and they have never been accessible to the public. They are subject to the ebb and flow of the tide. The presence of the ebb and flow of the tide is the sole basis for the claim of the United States that these two drains are navigable waters of the United States in which the public has the right of access by a jon boat or canoe for the purpose of pleasure boating.

The watercourses and the rice fields surrounding them are privately owned property under South Carolina law.

The filing of this suit by the government and the defenses asserted by Dr. Sasser raised the following questions:

1. Whether the Federal Courts have jurisdiction for the purpose of navigation by small pleasure boats when the watercourses in question lack navigability in fact, that is, they lack the capacity for useful interstate commerce.

2. Whether the presence of the ebb and flow of the tide alone, is a sufficient basis for the Court to find that these two watercourses are navigable waters of the United States when the watercourses in question are not navigable in fact, that is, they lack the capacity for useful interstate

commerce and have only one public terminus.

3. Whether the capacity for use for recreational boating, alone, without the capacity for use in interstate commerce, is a test of navigability for navigable waters of the United States.

4. Whether the removal of the barriers and permitting public use of the watercourses would constitute a Fifth Amendment Taking.

5. Whether the barriers are permitted or "grandfathered" under 33 C.F.R. 330.3(b).

6. Whether the navigational servitude has ever existed in the waterways, and if so, whether it has been abandoned.

LIST OF PARTIES

The Petitioner in this action is Dr. Marshall C. Sasser.

The Respondent is United States of America.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Marshall C. Sasser, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered July 24, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals was decided June 23, 1992, which affirmed the judgment of the District Court. This is reported in 967 F2d 993 (4th Cir. 1992).

The opinion and order of the District Court dated June 6, 1990, is reported in 738 F.Supp. 177 (D.S.C. 1990). The opinion and order of the District Court dated May 31, 1991, is reported in 771 F.Supp. 720 (D.S.C. 1991).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 24, 1992. A Petition for rehearing was denied on July 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1980, Dr. Marshall C. Sasser

purchased property in coastal Georgetown County, South Carolina that was formerly a rice plantation. Sasser had spent time on the property and surrounding lands since 1950, when his father had purchased some of the land. He owned an interest in the property involved from 1958 until it was sold in partition in 1978. In 1980, Sasser purchased his present property for $350,000. He had spent his boyhood on the property and at no time until 1987 had the Corps of Engineers exercised any jurisdiction within the rice fields. He purchased the property for his personal use and to create a private duck hunting club. He has since spent an additional $150,000 to build a clubhouse and make other improvements and he sold 12 memberships in his club.

The South Carolina Coast is largely made up of marshlands, both

fresh and salt water marshes. The marshes extend up the South Carolina fresh water rivers and were originally swamps which were cleared and used to grow rice. One witness, Agnes Baldwin, a land title examiner by profession, gave an Affidavit that she had examined the title to over 700 such marsh properties.

This case concerns two streams. One empties into the Intracoastal Waterway, and the other empties into the Pee Dee River. The Intracoastal Waterway and the Pee Dee River are navigable waters of the United States. The two streams in question are natural bodies of water that originate on privately owned land and serve to drain the old rice fields. Rice is no longer grown and the only value the old rice fields have is for hunting. There is no evidence of past, present or future

potential for commercial use in interstate commerce. Neither stream has a public terminus within the rice field where they originate. Both streams have a single public terminus at the point at which they drain into the intracoastal waterway and Pee Dee Rivers. Neither has ever been accessible to the public.

The parties have stipulated that both streams are subject to the ebb and flow of the tide; that is, they rise and fall with the tide. The two streams are also very shallow, subject only to use by canoes and jon boats.

Since at least the early 1940's, land owners have blocked access to the streams by placing wood and metal gates near the points where they meet the larger bodies of water (the Pee Dee River and the Intracoastal Waterway). The purpose of the barriers is to exclude the public. If the public is

given open access to Dr. Sasser's duck fields, it will destroy the only value they have, for hunting. In recent years, boaters have continually damaged the gates, and Sasser has repeatedly repaired them.

In 1987, one Rick Weatherford, who had been prosecuted for trespassing in rice fields on the Waccamaw River (Intracoastal Waterway) sent a number of letters and a Petition requesting that the Corps of Engineers take action to remove obstructions to the navigable waters of the United States in the Waccamaw and Pee Dee Rivers Delta. The Corps intervened and ordered Sasser and five other land owners who had blocked off similar streams to remove the barriers. The other five complied, but Sasser refused. The Government claims that it sought the removal of the barriers in order to end the boater-land

owner dispute and also to allow fishing, bird watching, wildlife photography, and pleasure boating on the streams. The Corps claims that the presence of the ebb and flow of the tide alone is a sufficient basis for the Court to declare these two streams to be navigable waters of the United States and thus the public has the right of access to them.

Dr. Sasser's claim is that the Corps lacks jurisdiction over the two streams in question for the purpose of subjecting them to the navigation servitude and thus permitting public access, because they lack the capacity for useful interstate commerce, and therefore, the Corps has no power to order him to remove the gates blocking access to the streams.

Dr. Sasser concedes that the Corps of Engineers has jurisdiction for the

purpose of requiring a permit for dredge and fill operations in the rice fields, under the Rivers and Harbors Act of 1899 and the Clean Water Act, but denies Corps of Engineers jurisdiction for purpesof subjecting the two streams to the navigation servitude, permitting public access.

Both waterways and the rice fields surrounding them have been privately owned property since 1732 and 1734 when the swamp at barrier 42 was granted by the Lords Proprietors to William Drake in 1732 and when the Waccamaw River Swamp at barrier 56 was granted by King George II to William Alston in 1734.

There is no evidence in the record that the two rice field drains were navigable at the time of creation of the thirteen original states. The party claiming navigability has the burden of proving it. Today, the watercourses are

limited to the capacity of use by jon boats and canoes for pleasure boating. There is no evidence in the record supporting navigablity in fact, that is that the streams have never been highways of commerce. Without two public termini, they never could be.

Both the Government and Dr. Sasser moved for summary judgment. On June 6, 1990, the District Court granted the Government's motion for summary judgment finding that the ebb and flow test of navigability applied and gave Dr. Sasser permission for an immediate appeal. The District Court reserved Defendant Sasser's motion for summary judgment for later determination. The United States Court of Appeals for the Fourth Circuit denied Dr. Sasser's petition for an immediate appeal. Hearings were held on Dr. Sasser's motion for summary judgment and the District Court denied his motion

for summary judgment by Order dated May 31, 1991.

Both motions for summary judgment were heard by the District Court on affidavits, exhibits and depositions.

Dr. Sasser appealed to the United States Court of Appeals for the Fourth Circuit which filed its opinion on June 23, 1992, finding the presence of the ebb and flow of the tide was a sufficient basis for the Corps of Engineers to have jurisdiction of the two streams in question and affirmed the decision of the District Court that the barriers to navigation on the two streams would have to be removed and permit public access.

Dr. Sasser's Petition for a rehearing was denied on July 22, 1992.

REASONS FOR GRANTING THE PETITION

The following are the reasons for the Supreme Court to grant Dr. Sasser's Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals:

1. The Fourth Circuit Court of Appeals has rendered a decision in conflict with the decision of other Federal Courts of Appeals on the same matter.

2. The Fourth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court.

3. The Fourth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

1. & 2.

On Page 4 of its Decision, the Court of Appeals for the Fourth Circuit correctly states Dr. Sasser's position when it says:

> "Sasser's theory is that the Corps lacked jurisdiction over the two streams in question, because they cannot really be used for interstate commerce, at least not nowadays. Therefore, he claims that the Corps had no power to order him to remove the gates blocking access to the streams."

The Court of Appeals then in its footnote on Page 4 says:

> "However, we need not reach the issue of whether the streams were used or are now capable for use in interstate commerce, which would pose difficult evidentiary questions, because we decide this case by applying the "ebb and flow" test."

This Decision by the Fourth Circuit is in conflict with the Ninth Circuit Court of Appeals case of United States v. Kaiser Aetna, 584 F.2d 378 (9th Cir.

1978) in which that Court said in a footnote on Page 381:

> "We accept, arguendo, the contention of Kaiser Aetna that Kuapa Pond in its natural state was not navigable; that although it was subject to the ebb and flow of the tide, that test determines the outer limits of an admittedly navigable waterbody and does not serve to render navigable a separate and distinct waterbody not otherwise navigable."

On appeal to the Supreme Court, Kaiser Aetna v. United States, 444 U.S. 164, the ebb and flow issue was not directly addressed, but it was implicitly rejected. Justice Blackmun said in his Dissenting Opinion on Page 181:

> "My disagreement with the Court lies in four areas. First, I believe the Court errs by implictly rejecting the old and long established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims."

On Page 5 of its Order, the Court of Appeals said:

> "In other words, Admiralty jurisdiction (The Daniel Ball) and jurisdiction based on the interstate commerce power are defined differently, and Sasser's reliance on the definition of Admiralty jurisdiction is misplaced."

Dr. Sasser submits that the Fourth Circuit has badly misinterpreted his reliance on The Daniel Ball. Dr. Sasser does not rely on Admiralty jurisdiction, he relies on the definitions of navigable waters and navigable waters of the United States found in The Daniel Ball. While The Daniel Ball was an Admiralty case on an inland river, the Supreme Court discussed it entirely in terms of the commerce power. In the case of National Wildlife Federation v. Alexander, 613 Fed.Rep.2d 1054 (D.C. Cir. 1979) the Court said on Page 1058:

> "Although the action in The Daniel Ball arose in Admiralty- the two statutes mandated this procedural form - the Court discussed congressional regulation of water borne

traffic wholly in terms of the commerce power."

In Boone v. United States, 944 F.2d 1489 (9th Cir. 1991) on Pages 1492 and 1493, the Court said:

> "Since Gibbons v. Ogden, the authority to regulate waterways under the commerce clause has been extended beyond control over waters navigable in fact.4"

In footnote 4 under the above quotation, the Court went on to say that although The Daniel Ball involved an interpretation of navigability for purposes of Admiralty jurisdiction, its "navigable in fact" test has been adopted by cases interpreting Congress' power under the commerce clause and cites United States v. Appalachian Electric Power Co., 311 U.S. 377 and United States v. Kress, 243 U.S. 316 (a case involving the navigational servitude.

Dr. Sasser believes that the Fourth Circuit Court of Appeals Decision is in

conflict with the National Wildlife and Boone cases.

The Court of Appeals misapprehends Dr. Sasser's argument that the Corps of Engineers lacked jurisdiction of the two streams in question. That position is stated within the context of the assertion by the Government that the ebb and flow of the tide is a sufficient basis to give the Corps of Engineers jurisdiction for the purpose of permitting public access under the navigational servitude.

The Fourth Circuit is in error and in conflict with Kaiser Aetna v. United States, 444 U.S. 164 (9th Cir. 1979) when it "lumps into one basket" this case with the cases of United States v. DeFelice, 641 F.2d 1169, 1173-75 (5th Cir. 1981); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 749-53 (9th Cir. 1978) and United States v. Stoeco Homes, Inc., 498

F.2d 597, 608-10 (3rd Cir. 1974) on Page 5 of its Decision by citing them as authority for its decision regarding these two streams. Those three cases all involve the jurisdiction of the Corps of Engineers under the Rivers and Harbors Act of 1899 and the Federal Water Pollution Control Act (Clean Water Act) for the purpose of requiring a permit for dredge and fill operations. The presence of the ebb and flow of the tide is the basis for Corps of Engineers jurisdiction for requring a permit for dredge and fill operations. In the DeFelice case, the waterway involved was held to be navigable by reason of it being a waterway used in interstate commerce. The other two cases involved dredge and fill operations in marshlands. Those cases did not hold that the ebb and flow of the tide gave the Corps of Engineers jurisdiction for the purpose

of imposing the navigational servitude and thus permitting public access.

In Kaiser Aetna v. United States, supra, 444 U.S. 164 (1979), on Page 170, the Supreme Court said:

> "all of this Court's cases dealing with the authority of Congress to regulate navigation that the so-called "navigational servitude" cannot simply be lumped into one basket. 408 F.Supp., at 148-49. As the District Court aptly stated, 'any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case."

On Page 6 of its Opinion, the Fourth Circuit concluded that the gates or barriers across the streams in question interfered with navigation at the present time and thus they could not be grandfathered under 33 C.F.R. § 330.3(b). The navigation being obstructed in this case is limited to jon boats and canoes for pleasure boating. Dr. Sasser believes that this is in conflict with

the Supreme Court case of The Daniel Ball, supra, (10 Wall.) 537 which established for all time the definition of navigability itself. The definition of navigability from The Daniel Ball, supra, on Page 563 states:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And, they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In State of Utah v. United States, 403 U.S. 9, on Page 10 and 11, after quoting that definition of navigability from The Daniel Ball, supra, the Supreme Court said:

> "While that statement was addressed to the navigability of 'rivers' it applies to all watercourses. United States v. Oregon, supra, 295 U.S. at 14, 55 S.Ct. at 615."

The reliance on Fisher v. Danos, 595 F.Supp. 461, 466-467 (E.D.La. 1984), aff'd 774 F.2d, 1158 (5th Cir. 1985) is misplaced.

The watercourse in Fisher v. Danos is Dennis Pass and is an obvious navigable water of the United States, being used by commercial vessels, a waterway having two public termini, one the Mississippi River and the other the Gulf of Mexico. Dr. Sasser's rice field drains have no terminus in the rice field. The one public terminus each has is where it empties into the Waccamaw and Pee Dee Rivers.

The Government cites no cases and we are unable to find any decision by the Supreme Court to the effect that a waterway with only one terminus and having only the capacity to float a jon boat or a canoe for pleasure boating is deemed to be navigable under Federal

law.

In addition, the Fourth Circuit Decision is in conflict with Leovy v. United States, 177 U.S. 621 (1900) 20 S.Ct. 797, in which the Supreme Court quoted Chief Justice Shaw on Page 802:

> "Very different was the view expressed by Chief Justice Shaw when he said it is not 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable.' But in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture. [Rowe v. Granite Bridge Corp.] 21 Pick. 344."

At issue in that case was whether or not a small stream coming out of a swamp emptying into the Mississippi River was navigable when it was dammed and for which the Defendant was being prosecuted for damming a navigable water of the United States. The Court criticized the instructions given by the trial judge to the effect that a

United States was one on which one could travel by water continuously to another state and the water is a navigable water, then it is a navigable stream of the United States. The Court went on to say:

> "If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.
>
> Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levies to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were

> the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general Government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes."

On Page 7 and 8 of its Opinion, the Fourth Circuit concluded that the Government would not have effected a compensable taking if the District Court is affirmed and Dr. Sasser is required to remove the gates blocking the rice field drains and allow public invasion, thus destroying the only value the property has, for hunting. Dr. Sasser believes that the Fourth Circuit decision is in conflict with both

Kaiser-Aetna v. United States, supra, 444 U.S. 164 (1979) and Boone v. United States, supra, 944 F.2d 1489 (9th Cir. 1981). In both of those cases, the Supreme Court held that the Army Corps of Engineers could not require public access to a lagoon which had been formed from a Hawaiian fish pond without payment of compensation under the Fifth Amendment even if it was presently navigable, particularly where the owner purchased the property surrounding and including the lagoon in reliance on the lagoon's private status under Hawaiian law. Dr. Sasser's rice fields are private property under South Carolina law. The two streams in question are not navigable under the definition of navigability contained in The Daniel Ball.

The Fourth Circuit has incorrectly interpreted the South Carolina case of

South Carolina v. South Carolina Coastal Council, 346 S.E.2d 716 (S.C. 1986) in citing that case as authority for public ownership of rice fields. That case is easily distinguished on the facts. In that case, the public had had unobstructed access to the canals in question to the point that the South Carolina Supreme Court said that the canals had been the legal equivalent of natural streams for many years and that public access could not now be denied. The public has never had access to Dr. Sasser's rice fields except as tresspassers.

This determination by the Fourth Circuit is in conflict with Kaiser-Aetna v. United States, 444 U.S. 164, 180, (1979), and Lamastus v. United States, 785 F.2d. 1349, 1352 (5th Cir. 1986), in which cases the Courts said to permit access would be invalid as a violation

of the Fifth Amendment and that the Government would have to exercise its power of eminent domain before public access would be allowed.

3.

The Fourth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by the Supreme Court.

An understanding of the physical makeup of the two streams in question is necessary to appreciate the importance of the question involved. The old rice fields were river swamps before being cleared, ditched and diked for the cultivation of rice. These two streams were natural drains of the swamps where they originated and emptied into the two rivers. The Coast of South Carolina today and the sides of the rivers flowing to the sea are covered with marshes similar to Dr. Sasser's rice

fields. The tide ebbs and flows in all of them.

Rice is no longer grown and the only value these rice field marshes have is for hunting. They are sill bought and sold today as privately owned property. Some have been rediked and many have not. Practically all have gates and barriers where the dikes and drains come out of the rice fields which are kept in place by owners to protect their fields from poachers.

This case is the first case ever in which the Corps of Engineers attempts to expand its jurisdiction by imposing the navigational servitude on rice field drains which are limited in navigable capacity to jon boats and canoes for the purpose of pleasure boating. These drains have no public terminus within the rice fields. There is no public place to go to and no

public place to come from.

As shown by the Affidavits of Agnes Baldwin, there are literally hundreds of similar marsh properties in Coastal South Carolina which will be adversely affected if the Fourth Circuit Decision is upheld. These are not "great navigable streams" that the Supreme Court has previously recognized as being "incapable of private ownership." See Kaiser Aetna v. United States, 444 U.S. 164, at 179 (1979); United States v. Chandler-Dunbar Co., 229 U.S. at 69; Twin City Power Co., 350 U.S. 222 (1956).

The Fourth Circuit Court of Appeals has decided the federal question of navigability for a purpose never before considered by the Courts and which is also in conflict with other Courts of Appeals and Decisions of the Supreme Court.

We go back again to The Daniel Ball definition of navigable waters. There is no evidence of these two streams having any capability for commercial use, past, present or future.

In Chisolm v. Caines, 67 Fed. 285 (1894), the Federal Court held that the presence of the ebb and flow of the tide did not make a stream a public navigable stream and that to be a public navigable stream it was essential that it be a highway between places, citing the South Carolina case of State v. Pacific Guano Co., 22 S.C. 50 (1884).

In Ball v. Herbert, 3 Term R. 253, the Court said:

> "The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway, a means open to the public of passing from one place, where they have a right to be, to another, in which they have the same right. The Montello, 11 Wall. 411, 20 Wall. 439....The essential to navigation is the same in

both, a highway between places."

In State of Alaska v. United States, 754 F.2d 851 (9th Cir. 1985), Cert. Den. 474 U.S. 968, the Court held that a lake was not navigable because it was not a water highway between places.

In Gulf & I. Ry. Co. v. Davis, 31 F.2d 109 (1929), the Circuit Court of Appeals upheld the District Court's finding that although the watercourse involved was subject to the ebb and flow of the tide, that it lacked the capacity for commercial use and the Court held it to be not navigable.

In Arthur M. Mannigault v. Alfred A. Springs, et al, 199 U.S. 473 (1905), the Supreme Court let stand the finding by the District Court of South Carolina its decision that the waterway known as Kinloch Creek in Georgetown County, South Carolina was not navigable because it had only one public terminus,

although it was subject to the ebb and flow of the tide.

In North American Dredging Co. v. Mintzer, 245 F. 297 (9th Cir. 1917), the waterway in question had never been used or regarded as navigable other than for duck boats or punts for hunting or fishing. The Court cited Harrison v. Fite, 148 F. 781, and quoted from it to the effect that because a stream is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes does not make it navigable.

The Corps of Engineers Regulations from 1946 until 1972 did not contain a definition of navigable waters nor navigable waters of the United States. Instead the Regulations quoted an excerpt from The Daniel Ball which included such definitions. The quotation of Chief Justice Shaw from

Roe v. Granite Bridge was also quoted. (App. H-1).

In 1972, as a result of the passage of The Clean Water Act, the Corps regulations were amended to give the definition of navigable waters of the United States as those waters which are presently, or have been in the past or may be in the future susceptible for use for purposes of interstate or foreign commerce (App. H-5).

It was in 1972 that the Corps regulations, for the first time extended the shoreward limit of jurisdiction to the reach of the mean high tide. It was not until subsequent amendments to the Corps regulations that the definition of navigable waters included the phrase ebb and flow of the tide.

If one is able to follow the tenuous trail of the changes in regulations, it should be fairly clear

that the navigation being protected by the Corps of Engineers prior to 1972 was navigability in fact and that it was the subsequent acts of Congress that broadened their jurisdiction for the purpose of the Clean Water Act to the reach of the mean high tide.

CONCLUSION

It is respectfully submitted that for all of the foregoing reasons and under the cases cited, that the Federal Courts do not have jurisdiction for the purpose of navigation by small pleasure boats when the watercourses in question lack navigability in fact; that the presence of the ebb and flow of the tide alone is not a sufficient basis for the Court to find that the two watercourses in question are navigable waters of the United States; that the two waterways in question are not navigable waters of the United States having only one public

terminus; that the capacity for use for recreational boating, alone, without the capacity for use in interstate commerce is not a test of navigability for navigable waters of the United States; that the removal of the barriers in permitting public use of the watercourses would constitute a Fifth Amendment Taking; that the definition of navigability adopted by the Fourth Circuit is in error and that the barriers are permitted or grandfathered under 33 C.F.R. 330.3(b).

Respectfully submitted,

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A P P E N D I X

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v.

MARSHALL C. SASSER,

Defendant.

O R D E R
CIVIL ACTION
NO. 2:88-2198-8
FILED: 6/6/90
ANN A. BIRCH,
CLERK,
CHARLESTON, SC
ENTERED: 6/8/90

This matter is before the court on the cross-motions of the plaintiff and the defendant for summary judgment. Plaintiff, the United States of America, has brought this action to require removal of barriers on two tidal watercourses in the Waccamaw and Pee Dee River areas of Georgetown County, South Carolina. Each watercourse is blocked by barriers owned and maintained by the defendant, Marshall C. Sasser. These barriers exclude the general public from navigating these watercourses. The plaintiff, under the Rivers and Harbors

Act of 1899, is seeking injunctive relief forcing the defendant to remove the barriers. This court held a hearing in this case on April 25, 1990, and the motions are ripe for disposition.

A review of the undisputed facts follows. The defendant owns and maintains a wooden fence-like barrier across the mouth of a tidal waterway located in Georgetown County. This barrier is in an area of former rice fields on an unnamed tributary of the Waccamaw River, and is identified by the parties as barrier number 56. It is undisputed that this stream is subject to the ebb and flow of the tide, that it is an irregularly shaped stream, and that it is a natural tributary of the Waccamaw River. This waterway is capable of supporting navigation by a canoe or a regular size jon boat - (12 to 14 feet). For purposes of this

decision, it appears that this stream was altered prior to 1771 by the developers of the rice plantation which once occupied the surrounding land. The watercourse was dammed off by the use of a bulkhead, and a ditch was cut around the existing stream to allow placement of a trunk-gate device. Additionally, the defendant owns and maintains a second fence-like barrier, identified by the parties as barrier number 42, which blocks the entrance to Caraway Creek. This creek is a tributary of the Pee Dee River, and is a natural stream subject to the ebb and flow of the tide. Caraway Creek is also capable of supporting navigation by a canoe or a regular size jon boat. the land surounding this creek was once a part of an 18th and 19th century rice plantation.

Presently, the land and marsh

surrounding barrier 56 and its unnamed watercourse is owned and maintained by the defendant, who manages it as a private preserve for a duck hunting club to which he sells memberships. Likewise, the land and marsh on the north side of Caraway Creek and barrier 42 is owned by the defendant, who manages it for the same purpose.[1] The acknowledged purpose of each barrier is to deny the public access to these waterways, and the defendant has posted signs on both barriers to this effect.

Until the 18th century, the areas in question were part of the pristine tidal swamps of the Waccamaw and Pee Dee River regions. With European settlement, these areas were cleared

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[1] The estate of A. M. Quattlebaum owns the land to the south of Caraway Creek. Originally, barrier 42 was owned by that estate, but was transferred by bill of sale to the defendant after this suit was brought.

and converted into rice fields. To support this type of agriculture, an intricate series of canals and ditches were constructed to irrigate and drain the fields by using the ebb and flow of the tide. Dikes with trunk-gates were constructed to hold and release water in the fields, and, when possible, use was made of existing natural creeks rather than constructing new canals. These natural creeks are distinguished from the canals by their winding and irregular paths. History reveals that the rice plantations did not last. The loss of slave labor rendered their operation unprofitable, and, before the end of the 19th century, the rice culture died. In recent years, the areas in question have been owned and maintained for the purpose of attracting ducks. The barriers at issue were erected to exclude members of the

general public from these hunting grounds.

The United States Army Corps of Engineers (the Corps) is vested by Congress with the responsibility of enforcing the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. This Act, in part, prohibits the obstruction of the navigable waters of the United States absent a permit issued by the Corps. No such permit has been issued by the Corps for barriers 42 and 56. The defendant has refused to remove the barriers when requested to do so by the Corps, and this action was filed to mandate their removal.

The motions before the court raise three issues. These are:

> 1. Is the ebb and flow of the tide a sufficient basis for classifying a watercourse as a navigable water of the United States for the purpose of asserting jurisdiction, and thus, prohibiting

unauthorized obstructions to navigation under the Rivers and Harbors Act of 1899?

2. Are the barriers permitted or "grandfathered" and, therefore, authorized under Section 10 of the Rivers and Harbors Act of 1899?

3. Does requiring the removal of the barriers constitute a taking of property from the defendant without just compensation, in violation of the Fifth Amendment of the United States Constitution?

The first issue is whether these streams are part of the navigable waters of the United States. There is no dispute that both watercourses are subject to the ebb and flow of the tide. The plaintiff argues that this is sufficient to classify the streams as navigable waters, while the defendant believes that the streams must be navigable in fact.

Under the principles of Admiralty law passed to this country from England before the revolution, navigable streams

were defined as those subject to the ebb and flow of the tide. The early American cases adopted this rule. However, unlike England, the United States has great inland waters that are capable of being used in commerce. As the nation grew westward, it became apparent that the test for navigability derived from the English courts was antiquated. Therefore, in The Daniel Ball, 77 U.S. 557 (1870), and in other cases, a new test was formulated. This test, the navigability in fact test, holds that a stream is navigable in fact when it is used, or is susceptible of being used, as a highway for commerce.

The problem in the case law is that the Supreme Court, in The Daniel Ball, did not state whether the navigable in fact test is now the exclusive method to determine navigability. While there is language in The Daniel Ball opinion to

the effect that the ebb and flow test was no longer applicable in this country, examination of more recent precedent suggests that either test of navigability may be employed to determine if a watercourse is navigable.

This court has conducted a thorough search of the law about navigable waters; it appears that every court that has reached the question has ruled that the ebb and flow test and the navigability in fact test co-exist. The ebb and flow test is rejected only when its use would limit Admiralty jurisdiction. 1 S. Friedell, Benedict on Admiralty § 141 n. 8 (1989). For instance, in Hassinger v. Tideland Elec. Membership Corp., 781 F.2d 1022 (4th Cir. 1986), this circuit held that navigable waters include all those areas within the ebb and flow of the tide. Although that is a maritime tort case,

it seems clear that, in this circuit, navigable waters have always meant ebb and flow, in addition to, and existing alongside with, the navigability in fact test.

The defendant believes that the navigability in fact test is the only test that is consistent with the purpose of the Rivers and Harbors Act. This court does not agree. Although there is no legislative history about the Act, the ebb and flow test is compatible with the purpose of the Act at issue here, which is to keep open the navigable waters of the United States for all legitimate public purposes. E.g., Shivley v. Bowlby, 152 U.S. 1 (1884) - (title to lands under tidal waters is held by the sovereign for the benefit of the whole people for the purposes of commerce, navigation, and fishery). The Rivers and Harbors Act must be

construed, in this court's opinion, to give the Corps jurisdiction under the widest possible test of navigable waters, because to find otherwise would allow public ownership of waters with no public right of access. That the only probable reason for access is for recreational use is of no import, as the public has a right of access to navigable waters. E.g., State Ex Rel. Medlock v. S.C. Coastal Council, 289 S.C. 445, 346 S.E.2d 716 (1986) - (waterway used by general public for boating, hunting, and fishing is navigable). As the defendant cannot own a navigable stream, it is illogical to allow him to block the public's access.[2]

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[2] It would also seem that the definition of navigability for purposes of the Act would be the definition in general usage at the time the Act passed in 1899. The only definition available to Congress at that time was the Admiralty definition. As Congress did

Furthermore, any discussion of the purpose of the Act is academic. Under United States v. Stoeco Homes, 498 F.2d 597 (3rd Cir. 1974), the ebb and flow test was employed to define the Corps' jurisdiction under the Rivers and Harbors Act. This case was cited with approval by the Fourth Circuit in Hassinger, 781 F.2d at 1026. Accordingly, this court is bound by precedent and finds that the ebb and flow of the tide is sufficient to confer jurisdiction on the Corps.

It further appears that the Supreme Court may have ruled on this issue. In Kaiser v. United States, 444 U.S. 164 (1979), the Court considered issues

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not redefine navigable waters for purposes of the Act, Congress must have concluded that the then current definitions of navigable waters - (including ebb and flow) - were suitable.

relating to the Rivers and Harbors Act. While the Court did not explicitly state that it was applying the ebb and flow test, it appears, under the facts of that case, that this test was applied. At issue was whether the Corps, by opening to the public a former tidal pool that had been dredged and converted into a marina, had unconstitutionally taken the property from the owners. It was, apparently, the tidal character of the pool that allowed the Corps' jurisdiction.

Perhaps of even more importance is that the Court in Kaiser Aetna cited with approval the Corps' regulation defining navigable waters. Kaiser Aetna, 444 U.S. at 171. This regulation, set forth at 33 C.F.R. § 329.4, is as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are

> presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

As the regulations of an administrativeagency are to be given weight when litigating issues concerning those regulations, e.g., Udall v. Tallman, 380 U.S. 1, 85 S.Ct 792 (1965), and the Supreme Court has approved this specific regulation, this court finds that it must apply the ebb and flow test in the present case.

At the hearing on these motions the defendant requested permission for an immediate appeal under 28 U.S.C. § 1292(b) on this court's determination that the waters herein involved constitute navigable waters of the

United States. The plaintiff agreed with this request. While this court has thoroughly analyzed the applicable legal authorities to determine that these streams are part of the navigable waters of the United States, it has concluded that there are ample grounds for a serious difference of opinion on this legal issue. Additionally, the guidance of the Fourth Circuit Court of Appeals would ultimately advance the termination of this litigation, as this court has yet to grapple with the difficult "grandfathering" and "takings" issues presented by these motions.

Accordingly, it is

ORDERED, that the defendant be, and he hereby is, directed to remove the obstructions herein designated as barrier numbers 42 and 56, as these barriers obstruct navigable waters of the United States.

As this court is of the opinion that this Order involves a controlling question of law as to which there is a substantial ground for a difference of opinion, and that an immediate appeal from this Order will materially advance the ultimate termination of this litigation; it is

ORDERED, that the defendant is granted leave to file an immediate appeal of this Order to the Fourth Circuit Court of Appeals under 28 U.S.C. § 1292(b); and

IT IS FURTHER ORDERED, that this case is stayed pending timely action on any Petition by the defendant to the Fourth Circuit Court of Appeals for permission to take an immediate appeal from this Order, and thereafter, until further Order of the Fourth Circuit Court of Appeals, should it allow an immediate appeal herein.

IT IS SO ORDERED.

/s/Sol Blatt, Jr.,
United States District Judge

Charleston, South Carolina
June 6, 1990

A TRUE COPY
Attest: Ann A. Birch, Clerk
By: Anne H. Jones
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 90-8109

MARSHALL C. SASSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

Upon consideration of the petition for permission to appeal an interlocutory order, pursuant to 28 U.S.C. 1292(b), and the government's motion for leave to file its answer out of time;

IT IS ORDERED that the government's motion for leave to file its answer out of time is granted and the petition for permission to appeal is denied.

ENTERED at the direction of Judge Phillips, with the concurrence of Chief Judge Ervin and Judge Wilkinson.

For the Court,

JOHN M. GREACEN
CLERK

FILED: July 13, 1990
ENTERED: July 16, 1990
ANN M. BIRCH, CLERK, CHARLESTON, S.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARSHALL C. SASSER,

Defendant.

O R D E R
CIVIL ACTION
NO. 2:88-2198-8
FILED: 5/31/91

ANN A. BIRCH,
CLERK

This matter is before the court on the cross-motions of the plaintiff and defendant for summary judgment. Plaintiff, the United States, has moved this court to require defendant to remove certain barriers, designated numbers 42 and 56, which obstruct navigable waters of the United States.

This court entered an order dated June 6, 1990,[1] in which it held that the streams involved herein were "navigable waters of the United States" because

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[1] United States v. Sasser, 738 F.Supp. 177 (D.S.C. 1990).

they were admittedly subject to the ebb and flow of the tide. By that same order this court granted leave for the parties to appeal that determination, and the case was stayed pending appeal. The Fourth Circuit Court of Appeals denied the request for interlocutory appeal and the matter came again before this court to resolve the remainder of the issues raised by the parties' motions for summary judgment.

In a hearing held October 3, 1990, defendant asserted that 33 C.F.R. § 330.3(b) served as a "grandfather" clause to permit these barriers to remain in place. The regulation provides nationwide permits for structures completed before December 18, 1968, and for structures in waterbodies over which the District Engineer had not asserted jurisdiction at the time the activity occurred, provided, in both

instances, there is no interference with navigation. There is ample evidence that barriers 42 and 56 were in place prior to December 18, 1968, and that the Corps did not assert jurisdiction over these two creeks at the time the barriers were originally erected. However, the very purpose of the barriers is to obstruct navigation into these creeks. Accordingly, for the reasons articulated at the October 3, 1990, hearing, this court found that these two barriers interfered with navigation and that 33 C.F.R. § 330.0(b) did not operate to permit these two barriers. Furthermore, at the same hearing, this court determined that any claim for compensation sought by defendant for an alleged "taking" of his property must be made under the Tucker Act in the Court of Claims.

In another hearing held March 25,

1991, defendant again argued that the type of navigation which was being protected by the Corps of Engineers at the time Barriers 42 and 56 were erected was navigation solely for the purpose of commerce. Defendant urged that the proviso of § 330.3(b), which requires that the "grandfathered" barriers cause no obstruction to navigation, referred only to the type of navigation being protected at the time the barriers were erected, or to the type of navigation being protected at the time the "grandfather" regulation was adopted. Defendant referred to the Corps' regulatory definition of "navigable waters" in place prior to 1972, which included a passage from The Daniel Ball, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1871).

For the reasons orally expressed at the March 25, 1991, hearing, this court

found that the term "navigation" as used in 33 C.F.R. § 33.0(b) is not limited as suggested by the defendant.[2] Although the Corps may not have enforced regulation of some tidal waters which were not immediately navigable for the purpose of commerce prior to 1972, the Corps has had jurisdiction over those waters since at least 1899 when the Rivers and Harbors Act was passed and one of the definitions of navigability in general usage then was the ebb and flow test derived from admiralty law. See, United States v. Stoeco Homes,

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[2] See, e.g., Fisher v. Danos, 595 F. Supp. 461, 466-67 (E.D.La. 1984), aff'd. without op. 774 F.2d 1158 (5th Cir. 1985). In Fisher, identical regulatory language contained in 33 C.F.R. § 320.4(g) (1981) was discussed with respect to two jetties which obstructed navigable waters of the United States but which had been in place prior to December 18, 1968. The District Court found that the jetties were an obstruction to navigation; therefore, the grandfather clause did not apply.

Inc., 498 F.2d 597, 608-10 (3rd Cir. 1974); accord, Hassinger v. Tideland Electric Membership Corp., 781 F.2d 1022 (4th Cir. 1986) (citing Stoeco with approval). Notwithstanding the Corps' enforcement policy prior to the 1972 regulation, the Corps' interpretation of that which constitutes "navigable waters of the United States" is not binding on this Court. As best stated in 33 C.F.R. § 329.3, "[p]recise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies."[3] It being this Court's opinion that the creeks involved herein are navigable waters of

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[3] Similar language was included in 33 C.F.R. § 209.260(a) in 1946, and the same language was retained in the 1972 amendments embodied in 33 C.F.R. § 209.260(b).

the United States subject to the jurisdiction of the Corps of Engineers, this court remains convinced that the grandfather clause in 33 C.F.R. § 330.3(b) does not exempt these barriers to navigation into the subject creeks from regulation by the Corps, regardless of the definition of navigation being used by the Corps for enforcement purposes prior to 1972.

Defendant also cited the Ninth Circuit Court of Appeals opinion in United States v. Kaiser Aetna, 584 F.2d 378 (9th Cir. 1978), to support its argument that the ebb and flow test alone is insufficient to establish a waterway as navigable water of the United States, because in Kaiser Aetna the test of navigability did not rest on ebb and flow of the tide alone, but instead on the pond's potential for navigation in commerce. Defendant

further directed the court's attention to footnote two of the Circuit Court opinion in Kaiser Aetna which states that "the [ebb and flow] test determines the outer limits of an admittedly navigable waterbody and does not serve to render navigable a separate and distinct waterbody not otherwise navigable."[4] In this regard, the court finds the defendant's reliance on Kaiser Aetna to be misplaced.

In Kaiser Aetna, though Kuapa pond had always been tidally influenced, a peculiarity of Hawaiian property law distinguished the pond as a private waterbody which was not subject to the federal navigational servitude prior to the improvements which connected the pond to the bay by a channel. Once

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[4] United States v. Kaiser Aetna, 584 F.2d 378, at note 2 (9th Cir. 1978); rev'd on other gr'ds, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d. 332 (1979).

Kuapa pond was connected to an open waterway it fell within the jurisdiction of the Corps of Engineers. In the case sub judice, there is no peculiarity of law which would remove the creeks in their natural state from the Corps' jurisdiction. Unlike the Hawaiian fish pond, which was inaccessible from the open bay prior to the dredging activities, there are no natural obstructions which prevent access from the Waccamaw and Pee Dee Rivers into these rice field creeks. The only obstructions to navigation into these two creeks are the barriers maintained by defendant.

Finally, defendant argued at the March 25, 1991, hearing that the Government is estopped from asserting the navigational servitude over these two waterbodies because it has acquiesced, by its inaction, to the

location of the barriers in these creeks for many, many years. Defendant contended that the Corps' permit policy in effect years ago when the barriers were constructed did not require permits for obstruction of these type waterways because the definition of navigability followed then by the Corps included only waterways which could support navigation for commerce. Arguing that the current regulation governing the waterways is inapplicable, defendant asserted that the Government is now estopped from using the new regulation to support its claim of jurisdiction over these two creeks. Defendant cites U.S. V. Stoeco Homes, Inc.,[5] to support its argument.

The holding of Stoeco is, by the Third Circuit's own words, to be

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[5] 498 F.2d 597 (3rd Cir. 1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d. 397 (1975).

narrowly construed. Id., at 611. Prior to the policy change of the Corps discussed in Stoeco, the tidal marshlands, which were the subject of that suit, had been converted to fast land in 1927 by a predecessor in title to Stoeco. The land had remained fast land for more twenty years before Stoeco purchased the land in 1951. In 1951, the land was largely situated above the mean high tide and was no longer subject to the ebb and flow of the tide. Stoeco had no notice at purchase that the Government had a claim of navigational servitude over this fast land.

After the land acquisition, Stoeco applied for a permit to dredge and create two separate waterways which were to have access to the adjacent Intercoastal Waterway. The Corps granted the permit in November, 1951, and work commenced. In addition to the

two waterways accessing the harbor, Stoeco's development plans included the creation of an internal lagoon system, above the established harbor line, which was to have no direct access to the coastal waters. In 1971,[6] the Corps took the position that Stoeco needed a permit to create the internal lagoon system because, although the land was currently above the mean high tide, the land had once been estuarine tidal marsh, and, therefore, was within the navigable waters of the United States.

In 1972, the Corps announced its position that estuarine tidal marshland, which was at anytime subject to the ebb and flow of the tide, is perpetually

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[6] Construction was delayed as a result of litigation unrelated to the tidal character of the land. When construction resumed in 1971, Stoeco modified its plan with respect to the internal lagoons but not with respect to the waterways which were connected to the intercoastal waters addressed by the 1951 permit.

subject to the navigational servitude of the United States. Id., at 605, citing 37 Fed.Reg. 18290, 18911, Sept. 1972. In September 1972, the Corps sought an injunction to prevent further construction in the Stoeco development until resolution of the dispute by the District Court. The injunction was granted and the District Court resolved the suit in favor of the government. The case was then appealed to the Third Circuit Court of Appeals.

The Third Circuit found that § 10 of the Rivers and Harbors Act gives the Corps authority to consent by permit to encroachments upon the navigational servitude of the United States. Further, the court found that if an administrative agency gives consent by permit without reservation, such consent must be considered to be a surrender of the right. The appellate court assumed

from the facts before it that the administrative practice in 1927 when the land was filled did not require agency consent for encroachments above the harbor line. The court concluded that in 1951, when Stoeco purchased land which had been fast land for more than twenty years, the navigational servitude had long since been surrendered. The Court held that a broad injunction against any construction whatsoever on the land in question was not sustainable under the facts of that case, but that construction in areas subject to the ebb and flow of the tide was subject to the new permitting scheme promulgated in accordance with § 10 of the Rivers and Harbors Act; however, the court clearly stated that its holding was limited to tidal marshland which had been converted to fast lands.

Such is not the situation before

this court. The subject of dispute in the instant case is the obstruction of two navigable waterways, not construction in an area of fast land which once had been estuarine tidal marshland. Unlike the facts of Stoeco, the estuarine nature of defendant's land was not shielded from the purchaser's eyes by the controversial actions of a prior owner, and the Corps' policy in question did not change after defendant's acquisition. Moreover, in Stoeco the applicable grandfathering regulation specifically referred to "work...completed or commenced in conformance with existing harbor line authority."[7] Such language suggests that the agency recognized a change in harbor line authority and made an exception for structures in conformity

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[7] 33 C.F.R. § 209.150(b)(2) (1972).

with prior harbor line authority.[8] The applicable regulation in the instant case makes no exception for, or reference to, obstructions in place under the Corps' prior interpretations or enforcement policies regarding navigable waterways. Furthermore, the "grandfathering" regulation applicable herein specifically excludes structures which obstruct navigable waterways. For these reasons, this court does not find the Stoeco case to be compelling on the facts of the case sub judice.

Defendant alleges that barriers of some form or fashion have spanned the two creeks in question since at least 1940-1945. In 1967, a predecessor in

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[8] Id. at 604, (emphasis added). In Stoeco, the Third Circuit Court of Appeals did not rest its holding that the government had surrendered the navigational servitude over the subject land on 33 C.F.R. § 209.150(b)(2) because the District Court had not made reference to that regulation in its order.

title erected Barrier 42 in its current position across Carraway Creek. In 1980, defendant acquired the land surrounding Carraway Creek where Barrier 42 is located. Defendant also purchased in 1980 the land surrounding the unnamed waterway spanned by Barrier 56.[9] In 1987, the Corps notified defendant that the two barriers obstructed navigable waterways of the United States and

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[9] There is a convoluted title history to the land surrounding the waterway spanned by Barrier 56 which supports defendant's claim that, though he only purchased this property in 1980, he has had ties to the subject property for many years.

The property had been owned by a corporation which was dissolved and the property was then conveyed to ten stockholders, each owning an undivided interest in the land. An interest was purchased by defendant's father who bequeathed that interest to defendant's mother. She conveyed her interest to defendant in 1958. Later, the property was partitioned in kind by the court, but defendant did not receive in that partition proceeding the parcel which bordered the waterway spanned by Barrier 56. Defendant purchased the share adjacent to Barrier 56 in 1980.

required removal of the barriers.

It is defendant's testimony that he has hunted on these lands since his childhood and that these barriers have always been in place. Defendant claims that he purchased these lands intending to use them for hunting, and that he would not have done so had he known the Corps would assert jurisdiction over the waterways. Defendant admits that he did not seek the approval of the Corps regarding the erection or maintenance of these barriers before the expenditure of funds to improve the land and organize his hunt club. Defendant now asks this court to find that the government has surrendered its navigational servitude and that the government should be estopped from asserting jurisdiction over these tidal creeks.

To invoke the doctrine of equitable estoppel one must prove that he

reasonably relied to his detriment on the material misrepresentations of his adversary, and that his adversary knowingly misrepresented facts with the expectation that those misrepresentations would be relied upon. Heckler v. Community Health Service, Inc., 467 U.S 51, 104 S.Ct. 2218, 2223, 81 L.Ed.2d 42 (1984). Estoppel against the Government is an extreme measure.[10] A party seeking to estop the Government must first demonstrate the traditional elements of estoppel and then must make a showing of some affirmative misconduct on the part of the Government to warrant estoppel against the sovereign.[11]

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[10] For a thorough discussion of case law on government estoppel see, Tosco Corp. v. Hodel, 611 F.Supp. 1130, 1201-1207 (D.C.Colo. 1985); 27 ALR Fed 702.

[11] See e.g., Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8-9, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973); Utah Power and Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917).

Generally, a person dealing with the Government is charged with the knowledge of, and is bound by, statutes and lawfully promulgated regulations. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85, 68 S.Ct. 1, 3, 92 L.Ed 10 (1947). When defendant purchased these two parcels of property bordering these two creeks, the regulatory definition of "navigable waters of the United States," which includes waterways subject to the ebb and flow of the tide, was already lawfully in place. The regulation prohibiting the obstruction of navigable waters of the United States was also in place. This court finds insufficient facts to support a case for simple equitable estoppel because defendant has failed to prove that his reliance on the historic placement of the barriers, without inquiry, was reasonable under the circumstances.

Further, this court finds that defendant has offered no evidence of affirmative misconduct on the part of the Government. Accordingly, this court finds that the Government is not estopped from asserting jurisdiction over these two creeks.

For the reasons stated herein, and in this court's order dated June 6, 1990, and for those reasons orally expressed at the hearings held on October 3, 1990, and March 25, 1991, it is

ORDERED that plaintiff's motion for summary judgment is hereby granted and defendant's motion for summary judgment is hereby denied.

IT IS FURTHER ORDERED that defendant shall remove the obstructions designated as barriers 42 and 56, as these barriers obstruct navigable waters of the United States, and such removal

shall take place no later than sixty (60) days from the date hereof; however, if this order is appealed, such appeal shall act as a stay of this order until a final decision is reached in this case by the Fourth Circuit Court of Appeals or the United States Supreme Court.

IT IS SO ORDERED.

/s/Sol Blatt, Jr.,
UNITED STATES DISTRICT JUDGE

Dated: May 31, 1991.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE #:
2:88-2198-8

MARSHALL C. SASSER, M.D.,

Defendant,

DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is granted, and defendant's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendant shall remove the obstructions designated as Barriers 42 and 56, as these barriers obstruct navigable waters of the United States, and such removal

shall take place no later than (60) days from the date hereof; however if case appealed, such appeal shall act as a stay of this order until a final decision is reached in this case by the Fourth Circuit Court of Appeals or the United States Supreme Court.

May 31, 1991
Date

Ann A. Birch
Clerk

/s/Judith M. McDowell
(By) Deputy Clerk

ORIGINAL FILED: May 31, 1991
ANN A. BIRCH, CLERK, CHARLESTON, S.C.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 91-2635

MARSHALL C. SASSER,
Defendant-Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston.
Solomon Blatt, Jr.,
Senior District Judge.
(CA-88-2198-2-8)

Argued: March 3, 1992

Decided: June 23, 1992

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and RAMSEY, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Phillips and Senior Judge Ramsey joined.

COUNSEL

ARGUED: Dove Walter Green, Jr., GREEN AND SASSER, Conway, South Carolina, for Appellant. Vicki Laine Plaut, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Phillip D. Sasser, GREEN AND SASSER, Conway, South Carolina; T. Allen Legare, Jr., LEGARE, HARE & SMITH, Charleston, South Carolina, for Appellant, Barry M. Hartman, Acting Assistant Attorney General, Robert L. Klarquist, Ellen Durkee, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; E. Bart Daniel, United States Attorney, R. Emery Clark, Assistant United States Attorney, Charleston, South Carolina, for Appellee.

OPINION

ERVIN, Chief Judge:

In 1987, the United States Army Corps of Engineers ("the Corps") ordered Marshall C. Sasser to remove barriers blocking access to two streams on his property. Sasser refused to comply, and the government sued Sasser for injunctive relief in the district court below. The district court ruled in the government's favor and ordered Sasser to remove the barriers. The district court found that the Corps had jurisdiction over this matter based on the fact that the two streams were subject to the ebb and flow of the tide. Sasser argues that the Corps lacked subject matter jurisdiction, that the corps did not follow its own regulations, and that the removal of the barriers would constitute a compensable taking of his property.

We now affirm.

I

In 1980, Sasser purchased property in coastal Georgetown County, South Carolina that was formerly a rice plantation. Sasser had spent time on the property and surrounding land since 1950, when his father had purchased some of the land. In 1980, Sasser purchased his present property for $350,000. Sasser claims that he only obtained the property in order to create a private duck hunting club. He has since spent an additional $150,000 to build a clubhouse and make other improvements, and he has sold twelve memberships in his club.

This case concerns two streams. One empties into the Intracoastal Waterway, and the other empties into the Pee Dee River. The Intracoastal Waterway and the Pee Dee River are

navigable waters of the United States. The two streams in question are natural bodies of water that originate on privately owned land and serve to drain the old rice fields. The parties have stipulated that both streams are subject to the ebb and flow of the tide; that is, they rise and fall with the tide. The two streams are also very shallow, subject only to use by canoes and jon boats. Since at least the early 1940's, landowners have blocked access to the streams by placing wood and metal gates near the points where they meet the larger bodies of water (the Pee Dee River and the Intracoastal Waterway). In recent years, boaters have continually damaged the gates, and Sasser has repeatedly repaired them. In 1987, after receiving a number of letters and a petition requesting action, the Corps intervened in this

feud, ordering Sasser and five other landowners who had blocked off similar streams to remove the barriers. The other five complied, but Sasser refused. The government claims that it sought the removal of the barriers in order to end the boater-landowner dispute and also to allow fishing, bird-watching, wildlife photographs, and pleasure boating on the streams.

II

Sasser first argues that the Corps lacked jurisdiction over the two streams. The Rivers and Harbors Act of 1899, 33 U.S.C. § 403, provides that "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited." The Act also authorizes the government to enforce the removal of any such obstruction in the district

courts. 33 U.S.C. § 406. By its terms, the Act "does not apply to...waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." 33 U.S.C. § 401. The Army Corps of Engineers is the agency charged with enforcing the Act. Consistent with the Act, the Corps' jurisdiction extends to "navigable waters of the United States," which are defined as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

In arguing that the Corps lacked jurisdiction, Sasser relies on The Daniel Ball, 77 U.S. 537 (1871), for the

proposition that the "ebb and flow" test may no longer be used to establish jurisdiction over waters of the United States. In The Daniel Ball, the Supreme Court defined "navigable waters" as waters that:

> form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water.

Id. at 563. Sasser's theory is that the Corps lacked jurisdiction over the two streams in question, because they cannot really be used for interstate commerce, at least not nowadays.* Therefore, he

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*Back when what is now Sasser's property was a rice plantation, the two streams may have been used to transport rice to a mill, which could be classified as "interstate commerce." If so, the streams at that time were "navigable" for purposes of Congress' commerce power, and "when once found to be navigable, a waterway remains so."

claims that the Corps had no power to order him to remove the gates blocking access to the streams.

The Fourth Circuit recently adopted The Daniel Ball test as its definition of admiralty jurisdiction:

> We thus define navigable water for purposes of admiralty jurisdiction as a body of water which, in its present configuration, constitutes a highway of commerce, alone or together with another body of water, between the states or with foreign countries over which commerce in its current mode is capable of being conducted.

Alford v. Appalachian Power Co., 951 F.2d 30, 32 (4th Cir. 1991). Although The Daniel Ball is thus still good law,

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United States v. Appalachian Elec. Power, 311 U.S. 377, 408 (1940). At oral argument, it was also suggested that the streams are presently suited to commercial use by fishing or hunting guides. However, we need not reach the issue of whether the streams were used or are now capable for use in interstate commerce, which would pose difficult evidentiary questions, because we decide this case by applying the "ebb and flow" test.

it does not support Sasser's theory because it does not apply to this case. Later language in Alford exposes the flaw in Sasser's argument:

> Admiralty, though, is not concerned with the maintenance of rivers or other bodies of water, but rather with the conduct of those who use them, and it does not extend to the limits of federal power over waters of the United States. Other federal interests may and do justify federal jurisdiction over waters which are defined as navigable for other purposes.

Id. at 33 (citing Kaiser-Aetna v. United States, 444 U.S. 164, 171-72 & n.7 (1979). The Alford court pointed out that admiralty jurisdiction does not cover the maintenance of bodies of water, which is what this case involves. The jurisdiction that does cover maintaining bodies of water is based on the interstate commerce power. In other words, admiralty jurisdiction (The Daniel Ball) and jurisdiction based on

the interstate commerce power are defined differently, and Sasser's reliance on the definition of admiralty jurisdiction is misplaced.

Sasser's argument that The Daniel Ball sounded the death knell for the "ebb and flow" test is without support, in cases such as this one that involve coastal, rather than inland, waters. The Supreme Court has noted that there are at least four tests for determining whether bodies of water are "navigable waters of the United States." Kaiser-Aetna v. United States, 444 U.S. 164 (1979). The tests are: (1) ebb and flow, (2) connection with a continuous interstate waterway, (3) navigable capacity, and (4) navigable in fact. Id. at 170-72. While the Court has not faced the precise argument that Sasser raises, several Circuit Courts of Appeal have, and all have held that whether

waters are subject to the ebb and flow of the tide is a valid test for determining the Corps' jurisdiction over coastal waters. See, e.g., United States v. DeFelice, 641 F.2d 1169, 1173-75 (5th Cir. 1981); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 749-53 (9th Cir. 1978); United States v. Stoeco Homes, Inc., 498 F.2d 597, 608-10 (3d Cir. 1974). Those courts reasoned thatthe "ebb and flow" test and The Daniel Ball definition of "navigable waters" logically coexist, because The Daniel Ball actually expanded admiralty jurisdiction, while abandoning the "ebb and flow" test in coastal waters would serve to contract federal jurisdiction. See Defelice, 641 F.2d at 1175 n.14; Stoeco Homes, 498 F.2d at 610. Moreover, those courts have noted that defining "navigable waters of the United States" to include waters subject to the

ebb and flow of the tide is well within the limits of the interstate commerce power. See Stoeco Homes, 498 F.2d at 610. Finding the caselaw from other circuits persuasive, we hold that the "ebb and flow' test is a valid means of determining the Corps' jurisdiction over tidal waters.

Next, Sasser argues that the grandfather clause in the Corps' own regulations guarantees the continued existence of the two gates. Under 33 C.F.R. § 330.3(b), no further permits are required for structures when (1) they were completed before December 18, 1968; (2) the Corps had not asserted jurisdiction at the time the activity occurred; and (3) the structures do not interfere with navigation. Both parties agree that this three-part test applies and that all three requirements must be met; they differ only as to the

application of the test. There is no dispute over the second requirement, because the Corps did not assert jurisdiction when the gates were first constructed. As for the first requirement, the government argues that the barriers were not completed before 1968, because Sasser has had to repair and replace them continually since that time. Sasser maintains that gates have stood at the same sites since the early 1940's, so that they were completed before 1968. Because the record as to the existence of the gates since 1968 is unclear, we decline to rule on this requirement.

A better basis for deciding this issue is the third part of the grandfather test: whether the gates interefere with navigation. The gates clearly interfere with navigation at the present time, because they prevent

boaters from going up the streams. However, Sasser argues that their interference with navigation should be evaluated as of the time they were built - the early 1940's. Sasser's theory is meritless. The regulation does not state that the interference with navigation should be measured as of the time the activity first occurred. In fact, the regulation's plain language ("there is no interference with navigation") indicates that the lack of interference must exist at the present time. Also, the regulation applies to a wide range of structures, not just those that interfere with navigation. It makes sense for the regulation to waive future permit requirements only for those existing structures that do not currently interfere with navigation. After all, one purpose of the Rivers and Harbors Act, upon which the regulation

is based, is to direct the Corps to prevent and remove obstacles to navigation. In addition, caselaw supports the government's position. See Fisher v. Danos, 595 F.Supp. 461, 466-67 (E.D. La. 1984), aff'd, 774 F.2d 1158 (5th Cir. 1985). We therefore hold that the gates are not grandfathered under the Corps' regulations, because the gates currently interfere with navigation.

Sasser next argues that the Corps failed to comply with its own regulations and that this failure prevents the government from bringing this action. Sasser bases this argument on 33 C.F.R. § 329.14, which requires the Corps to investigate questions of jurisdiction and navigability by following certain procedures. Sasser cites a number of cases for the proposition that agencies are required

to follow their own regulations. However, the regulation in question only requires the Corps to go through the procedures "when jurisdictional questions arise." 33 C.F.R. § 329.14(a). As discussed above, the parties here stipulated that the streams in question are subject to the ebb and flow of the tide, removing any real question of jurisidction. Sasser's reliance on The Daniel Ball did not by itself create a jurisdictional question within the meaning of the regulation. In addition, the government argues that it was justified in bypassing administrative procedures, citing United States v. Zweifel, 509 F.2d 1150 (10th Cir. 1975) (holding government may proceed in administrative tribunal or, under statute, in district court to clear title to public lands). The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 406,

416, states that the Department of Justice and the Attorney General shall conduct the legal proceedings necessary for enforcing the Rivers and Harbors Act. The Act does not require any prior administrative action. Therefore, either because no actual jurisdictional question arose, or under the terms of the Rivers and Harbors Act, the Corps failure to investigate its jurisdiction in this case was immaterial.

Finally, Sasser argues that the government will have effected a compensable taking, if we affirm the district court and allow the Corps to remove the gates blocking access to the streams. He points to the $500,000 he has spent in expectation that he would continue to have a private duck hunting club, and he states that allowing pleasure boaters to use the streams will destroy the value of his property. The

gates were necessary in the first place, Sasser states, to keep poachers and other trespassers off his land. Sasser relies primarily on Kaiser-Aetna v. United States, 444 U.S. 164 (1979). In Kaiser-Aetna, developers in Hawaii converted a landlocked lake into a marina with access to the ocean. They planned to charge boat owners $72 per year to use the marina. The government first gave its approval to the developers' plan but then later required the owners to allow free access to the marina. In finding that there was a compensable taking, the Court reasoned that, although the government could not be estopped by its earlier approval, the government's actions had led the marina owners to expect they had the right to exclude others. Id. at 179-80. This case differs from Kaiser-Aetna in two important respects. First, the Corps

in this case did nothing to give Sasser an expectation that he had the right to exclude others. The Rivers and Harbors Act and Corps regulations at issue were in effect before Sasser purchased his property in 1980, and the government at no time gave any approval to Sasser's project. Second, it was important in Kaiser-Aetna that Hawaiian state law defined the property in question as private. Here, in contrast, the South Carolina Supreme Court has held that other old rice plantation canals in Georgetown County are navigable waters subject to public use. South Carolina v. South Carolina Coastl Council, 346 S.E.2d 716, 719 (S.C. 1986). Therefore, We hold that Kaiser-Aetna does not require a finding that the Corps has effected a compensable taking.

In addition, later Supreme Court cases make it clear that Sasser should

seek any possible relief under the Tucker Act in the Court of Claims. See Preseault v. I.C.C., 494 U.S. 1 (1990); United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). In Preseault, the Court found a takings claim premature because the appellants had not made use of their Tucker Act remedy. 494 U.S. at 17. In Riverside Bayview Homes, the Court reversed a lower court's decision that the Corps' regulatory jurisdiction over wetlands should be construed narrowly to avoid a takings question. The Court found that requiring or denying a permit to fill wetlands was not necessarily a taking, and that the tucker Act remedy was available to provide compensation for takings that might result from the corps' regulatory acts. 474 U.S. at 128-29. Moreover, Sasser's damages are purely speculative at this point; it is

impossible to predict whether and to what extent pleasure boaters will adversely affect the value of his duck hunting preserve. We therefore hold that Sasser must bring any future takings action in the Court of Claims.

For the reasons expressed above, the judgment of the district court is hereby

AFFIRMED.

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

FILED: June 23, 1992

No. 91-2635
CA-88-2198-2-8

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARSHALL C. SASSER,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

This case was heard by the Court on the record from the District Court and was argued by counsel.

The Court affirms the judgment of the District Court.

A true Copy, /s/ Bert M. Montague
Teste: CLERK
/s/ Bert Montague, Clerk
By Carl Dowling
Deputy Clerk

FILED: July 24, 1992
ANN A. BIRCH, CLERK, COLUMBIA, S.C.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 91-2635
CA 2:88-2198-8

MARSHALL C. SASSER,
Defendant-Appellant.

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

Appellant filed a petition for rehearing with suggestion for rehearing in banc and a motion for leave to file the petition out of time. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court grants the motion for leave to file the petition out of time and denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge

Ervin, with the concurrence of Judge Phillips and Judge Ramsey.

For the Court,

/s/Bert M. Montague,
Clerk

FILED: July 22, 1992
ENTERED: JULY 24, 1992
ANN A BIRCH, CLERK, COLUMBIA, S.C.

A True Copy, Teste:
Bert M. Montague, Clerk
By: Amy Chuch
Deputy Clerk

STATUTES AND REGULATIONS

FEDERAL REGISTER, WEDNESDAY,

SEPTEMBER 11, 1946

WAR DEPARTMENT

SUBSTANTIVE RULES, POLICY,

AND INTERPRETATIONS

§ 209.260 Navigable waters of the United States. (a) In the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, the War Department is frequently called upon to make determinations as to the navigability of waterways. It should be understood that such determinations merely represent the views of the Department since the jurisdiction of the United States can be conclusively determined only through judicial proceedings. As information, definitions as to what constitutes a navigable water of the United States

based on decisions of the Supreme Court are as follows: Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used, in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contra-distinction from the navigable waters of the States when they form in their ordinary condition by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. The Daniel Ball, 10 Wall. 557.

(b) The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce no matter in what mode the commerce may be conmducted, it is navigable in fact, and becomes in law a public river or highway. As Chief Justice Shaw said (21 Pickering 344), it is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture. The Montello, 20 Wall. 430.

FEDERAL REGISTER

SEPTEMBER 9, 1972

RULES AND REGULATIONS

§ 209.260 Definition of navigable waters of the United States.

(a) Purpose and scope. This section defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice, and procedure to be used in determing the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters."

(b) General policies. The term "navigable waters of the United States" is used to define the scope and extent of the regulatory powers of the Federal Government. Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial

interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this section are in close conformance with the tests used by the Federal courts and determinations made under this section are considered binding in regard to the activities of the Corp of Engineers.

(c) General definition. Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

(d) General scope of determination.

The several factors which must be examined when making a determination whether a water body is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(1) Past, present, or potential presence of interstate or foreign commerce;

(2) Physical capabilities for use by commerce as in subparagraph (1) of this paragraph;

(3) Defined geographic limits of the water body.

(c) Interstate or foreign commerce-

(1) Nature of commerce: type, means, and extent of use. The types of commercial use of a wateray are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of

navigation. It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor, and not the time, extent or manner of that use.....

§ 209.260(k)

(ii) Shoreward limit of jurisdiction.

Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water.....

FEDERAL REGISTER

NOVEMBER 13,1986

RULES AND REGULATIONS

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use

to transport interstate or foreign comerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not entinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigible water of the United States are discussed in detail below. Generally, the follwing condisions must satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of

the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) Nature of commerce: type, means, and extent of use. The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use....

§ 330.3 Activities occurring before certain dates.

The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:

(b) Structures or work completed

before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation. (Section 10).

Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1145

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARSHALL C. SASSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States has authority under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, to require petitioner to remove barriers that he maintains across naturally occurring streams that are subject to the ebb and flow of the tide.

2. Whether petitioner's barriers are authorized under a "grandfather" provision of the Corps of Engineers' regulations, 33 C.F.R. 330.3(b).

3. Whether the Fifth Amendment requires the United States to pay compensation for removal of the barriers.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1145

MARSHALL C. SASSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E1-E22) is reported at 967 F.2d 993. The opinions of the district court (Pet. App. A1-A17, C1-C22) are reported at 738 F. Supp. 177 and 771 F. Supp. 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. F1) was entered on June 23, 1992. Petitioner filed a petition for rehearing out of time, but it was accepted by the court of appeals and denied on July 24, 1992. Pet. App. G1-G2. The petition for a writ of certiorari was filed on October 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the authority of the United States under the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. 401 *et seq.*, to require petitioner to remove barriers he maintains across certain waterways that pass through his property in Georgetown County, South Carolina. The United States District Court for the District of South Carolina ordered petitioner to remove the barriers, Pet. App. D1-D2, and the court of appeals affirmed, *id.* at E1-E22.

1. The RHA broadly prohibits the placement of unauthorized obstructions, including structures, in "waters of the United States." 33 U.S.C. 403. See generally *United States* v. *Alaska*, 112 S. Ct. 1606 (1992). Section 10 of the RHA provides in relevant part that:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any * * * structures in any * * * canal, navigable river, or other water of the United States, * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army * * *.

33 U.S.C. 403. The Secretary of the Army has defined "navigable waters" for purposes of Section 10 to include:

> [T]hose waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to

> transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

33 C.F.R. 329.4. Section 12 of the RHA authorizes the Attorney General to seek an injunction ordering "the removal of any structures or parts of structures erected in violation of [Section 10]." 33 U.S.C. 406.

2. Petitioner has maintained wooden and steel fences across the mouths of two naturally occurring tidal streams that pass through his property and empty into the Pee Dee River and the Intracoastal Waterway. Petitioner concedes that the streams are subject to the ebb and flow of the tide. In response to complaints from recreational boaters, the Army Corps of Engineers directed petitioner to remove the barriers. Petitioner refused, and the United States brought suit pursuant to the RHA to obtain an injunction ordering removal of the structures. Pet. App. A1-A6, E4-E6. The district court concluded on motions for summary judgment that the streams at issue are waters of the United States, *id.* at A1-A17, and that the United States is entitled under the RHA to an injunction ordering removal of the barriers, *id.* at C1-C22.

3. The court of appeals affirmed. Pet. App. E1-E22. It rejected petitioner's argument that this Court's decision in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), an admiralty case holding that "navigable waters" include waters capable of use for conducting interstate commerce, *id.* at 563, sets forth the exclusive test for navigability under the RHA. Pet.

App. E7-E13. "Finding the caselaw from other circuits persuasive," the court concluded that the Corps' longstanding "ebb and flow" test is also "a valid means of determining the Corps' jurisdiction over tidal waters." *Id.* at E13.

The court also rejected petitioner's argument that the barriers are authorized under a "grandfather" provision of the Corps' regulations, 33 C.F.R. 330.3(b). The court concluded that the provision is inapplicable because it expressly applies only to structures that cause no "interference with navigation." Pet. App. E13-E16. Finally, the court found no merit in petitioner's contentions that the Corps failed to follow its own procedural requirements, *id.* at E16-E18, and that the Fifth Amendment requires the United States to pay compensation in connection with removal of the barriers, *id.* at E19-E22.

ARGUMENT

Petitioner basically contends that the United States has no authority to require him to remove his obstructions to navigation, because the natural streams he has obstructed are currently of use only to recreational boaters. The court of appeals correctly rejected petitioner's arguments, its decision does not conflict with any decision of this Court or another court of appeals, and the issues presented do not warrant further review.

1. Petitioner reasserts his argument that this Court's admiralty decision in *The Daniel Ball*, *supra*, provides the exclusive test for determining navigability under the RHA. Pet. 12-24. Petitioner cites numerous cases endorsing *The Daniel Ball*'s so-called "navigable in fact" test, but he fails to cite a

single case identifying that test as the *exclusive* one for purposes of the RHA. The Army Corps of Engineers has correctly concluded that its regulatory jurisdiction under the RHA also extends to coastal waters, such as the natural streams here, that are subject to the ebb and flow of the tide. See 33 C.F.R. 329.4.

The Corps' regulatory definition restates settled law, which has long treated as navigable those waters that are subject to the ebb and flow of the tide. See, *e.g.*, *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469 (1988) (land beneath tidal waters passed to States, even if waters were not navigable in fact); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 & n.6 (1979) (noting that tidal waters are subject to the Corps' regulatory jurisdiction). See also, *e.g.*, 4 *Waters and Water Rights* 131 & n.83 (R. Beck ed. 1991) ("even when not navigable in fact, waters subject to the ebb and flow of the tide are considered as 'navigable at law' for purposes of federal regulatory authority").

As the court of appeals recognized, every court of appeals that has addressed the issue has held that the "ebb and flow" test is a "valid test for determining the Corps' jurisdiction over coastal waters." Pet. App. E11-E12. See *United States* v. *DeFelice*, 641 F.2d 1169, 1172-1175 (5th Cir.), cert. denied, 454 U.S. 940 (1981); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 749-753 (9th Cir. 1978); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 608-610 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). The issue does not warrant further review.*

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* Petitioner attempts to distinguish those cases (Pet. 16-18) on the ground that they involve dredge and fill permits under

2. Petitioner also raises among his questions presented (Pet. iii) the issue whether his obstructions are subject to a "grandfather" provision in the Corps' regulation that authorizes certain structures in existence prior to 1968. See 33 C.F.R. 330.3(b). Petitioner, however, provides no supporting argument in the body of his petition. The court of appeals correctly concluded that petitioner does not qualify for the exemption, because the exemption is limited to structures that cause no "interference with navigation" and his barriers are specifically designed to prevent boaters from using the streams. Pet. App. E14-E16. See *Fisher* v. *Danos*, 595 F. Supp. 461, 466-467 (E.D. La. 1984) (jetties completed before cutoff fell outside exemption because they were hazards to navigation), aff'd, 774 F.2d 1158 (5th Cir. 1985) (Table); see also *United States* v. *Cumberland Farms, Inc.*, 647 F. Supp. 1166, 1178-1180 (D. Mass. 1986), aff'd, 826 F.2d 1151, 1157-1160 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988); *Vieux Carre*

Section 10 and the Federal Water Pollution Control Act, and not removal of an obstruction under Section 10. But that is a distinction without a difference. All Section 10 cases present the same core grievance: the failure of the landowner to seek a permit before taking action that might affect the waters. See, *e.g.*, *United States* v. *Ray*, 423 F.2d 16, 19 (5th Cir. 1970) (navigability finding supports Corps' jurisdiction over both obstruction and dredge and fill permitting). Petitioner also incorrectly contends (Pet. 27-28) that without "two public termini" a waterway cannot be found navigable. Pet. 20-21. Harbors provide an obvious example. See also *United States* v. *Lamastus & Assocs.*, 785 F.2d 1349, 1353 n.7 (5th Cir. 1986) ("A waterway is no less capable of sustaining interstate commerce because it only opens at one end."); 33 C.F.R. 329.8 (canals open at only one end may be navigable).

Property Owners, Residents & Assocs. v. *Brown*, 875 F.2d 453, 464 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990).

3. Petitioner additionally contends (Pet. 23-26) that an order requiring that he remove his barricades amounts to a compensable taking of his property under the Fifth Amendment. He relies on this Court's decision in *Kaiser Aetna*, *supra*, and the Ninth Circuit's decision in *Boone* v. *United States*, 944 F.2d 1489 (1991). Those decisions, however, involve a different issue. In both of those cases, the question was whether the government could invoke its navigational servitude to require public access to a formerly enclosed Hawaiian lagoon that was private property under state law. See *Kaiser Aetna*, 444 U.S. at 165-166; *Boone*, 944 F.2d at 1491-1492. The question here, by contrast, is whether the government has authority under the RHA to require removal of unauthorized obstructions placed at the mouth of navigable waters. Moreover, as the court of appeals recognized, the waters at issue here are *not* private property under state law. Petitioner has no right under state law, comparable to the rights of the Hawaiian owners of enclosed lagoons, to exclude persons from the streams that pass through his lands. Pet. App. E20. See *State ex rel. Medlock* v. *South Carolina Coastal Council*, 346 S.E.2d 716, 719 (S.C. 1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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